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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-288

ROBERT N. PRATT,
Petitioner

vs.

THE STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIAM B. McCOLLOUGH, JR.
McCollough & McCollough
Attorney for Robert N. Pratt
910 Frank Nelson Building
Birmingham, Alabama 35203

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Robert N. Pratt, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on March 20, 1973, which judgment affirmed the conviction of Robert N. Pratt in the Circuit Court of Jefferson County, Alabama, for the crime of practicing law without a license.

A timely Application for Rehearing in the Alabama Court of Criminal Appeals was denied without opinion on April 17, 1973.

A timely Application for Writ of Certiorari was filed in the Supreme Court of Alabama and was denied, without opinion, on May 24, 1973.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals has been reported at 278 So. 2d 724, cert. den. 278 So. 2d 729, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on March 20, 1973, and appears in the Appendix hereto. A timely Application for Rehearing was denied on April 17, 1973.

A Petition for Writ of Certiorari, timely filed in the Supreme Court of Alabama, was denied on May 24, 1973, and the order thereon appears in the Appendix.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Alabama Court of Criminal Appeals is 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner Pratt denied his XIV Amendment rights when the State of Alabama failed to elect under which Alabama statute it prosecuted him?
2. Was Petitioner Pratt denied equal protection of the law under Amendment XIV where the trial court denied him sufficient time to rebut the testimony of a State's witness after a presumption of an illegal verdict was raised?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Annotated, Title 28:

§1257 (3) State courts; appeal, certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * *

(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

Code of Alabama, 1940 (Recomp. 1958), Title 46, § 31:

§ 31. UNLAWFUL PRACTICE OF LAW. – If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within thirty days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed five hundred dollars, or be imprisoned for a period not to exceed six months, or both.

Code of Alabama, 1940 (Recomp. 1958), Title 46, §42:

§42. WHO MAY PRACTICE AS ATTORNEYS. – Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, (a) in a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a justice of the peace, or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or (b) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or, (c) for a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or, (d) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between

persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law. Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands; nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property, however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded. Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law. And any person, firm or corporation who conspires with, aids and abets, another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law.

STATEMENT OF THE CASE

The prosecution in this case commenced upon a district attorney's complaint charging the Petitioner with unlawfully engaging in the practice of law after previously surrendering his license to practice law and further alleging that on September 15, 1969, the Petitioner met with one Sherry Morris in Jefferson County, Alabama, and did agree to obtain for the Morris' a divorce in consideration of the payment of $160.00 to himself. The complaint further alleged

that several months later Mrs. Morris received a divorce decree in the mail.

The sufficiency of the complaint was attacked by Petitioner's demurrer on the grounds of vagueness, uncertainty and duplicity due to failure to sufficiently allege a violation of either Section 31 or Section 42 of Title 46, *Code of Alabama*. The demurrers were overruled and at the commencement of trial, Petitioner moved to require the State of Alabama to elect whether it proceeded under the provisions of Section 31 or Section 42. Petitioner's motion was overruled by the Court.

The trial commenced with a stipulation that the Petitioner had voluntarily surrendered his license to practice law in 1964.

The State's case was based largely upon the testimony of Sherry Morris who identified a business card bearing the name Robert N. Pratt and the title "Attorney at Law", and a receipt signed by Petitioner acknowledging receipt of $160.00 on September 15, 1969. Both exhibits were admitted into evidence.

The witness stated that she first met Petitioner in September, 1969, and that he advised Mr. and Mrs. Morris to reconcile their differences in lieu of obtaining a divorce. The witness stated that she later called Petitioner, met him at a shopping center in Jefferson County, Alabama, and gave him $160.00 for which he gave her a receipt. The witness stated that she later met Petitioner at a parking lot and signed some papers for him. Then, at a later date, she testified she received a decree of divorce in the mail which showed a return address of "Pratt's Radiator Shop".

On cross-examination the witness testified that there was never any conversation between herself and Petitioner as to whether he was or was not a lawyer. Upon further examination the witness testified that she had sworn certain facts to be true as part of the divorce, but that all of the said facts were not true. Upon objection by the State, the witness was not allowed to answer as to whether the marriage of her ex-husband to Petitioner's niece had created feelings of ill will toward Petitioner in her mind.

The State's next witness, Jeanell Hambley, the sister of Mrs. Morris, merely corroborated the testimony of Mrs. Morris as to a previous meeting with Petitioner. The next witness for the State was David Hambley, the husband of the previous witness, whose testimony was virtually identical to that of his wife. Thereafter, the State rested.

Petitioner then moved for a directed verdict, to exclude the State's evidence, and to compel the State to make an election as to whether it was proceeding under the provisions of Section 31 or Section 42 of Title 46 of the *Code of Alabama*. These motions were overruled by the trial court.

The first witness for the Petitioner was Peter Morris, the former husband of Sherry Morris who had testified previously on behalf of the State of Alabama. He testified that the first conversation he had with Petitioner with reference to a divorce was when he asked if Petitioner knew a lawyer who could get a divorce for him. He then testified that the attorney who represented him in the actual divorce proceedings was Roy Williams, not the Petitioner Robert Pratt.

On cross-examination Mr. Morris testified that he had never seen the aforesaid Roy Williams and that he had signed the papers for a divorce in the presence of Petitioner's mother at the Pratt Radiator Shop. He further testified that since the divorce he had remarried and that his wife was related to the Petitioner.

Petitioner then took the stand in his own defense to testify that he had first been contacted by Peter Morris in August or September of 1969 concerning certain marital difficulty. He stated that he later received a call from Peter Morris who asked if he and his wife could come over to talk to Petitioner about a divorce. Petitioner testified that he told them he could not get a divorce for them but that he would be glad to talk with them about their problems and that he could refer them to Roy Williams who would handle a divorce for them if that is what they wanted.

Petitioner then testified that two weeks later he received a phone call from Peter Morris who said that he and his wife wanted to talk with him once again. He testified that on this occasion Mr. and Mrs. Morris brought Mr. and

Mrs. Hambley with them, and that they all sat down together while the Morris' discussed their marital problems. Petitioner testified that he made some notes on this occasion and told the Morris' that he would make arrangements for Mr. Williams to handle the divorce for them. He further testified that the notes he made on that occasion were turned over to Mr. Williams and that Mr. Williams, not himself, had drawn up and prepared all the papers which were used in connection with the divorce.

Robert Pratt further testified that the papers which had been prepared by Mr. Williams were delivered to the Pratt Radiator Shop and that Peter Morris signed the papers there. He further testified that, at a later date, he met Mrs. Morris at a shopping center where she brought some money for the divorce and signed the papers.

Petitioner then testified that he took all of the papers and the money and delivered them to Mr. Williams at his office the next day. He then identified Roy Williams' signature on the divorce as being authentic.

On cross-examination the Petitioner testified that in early 1970 the Morris' advised him that they were desirous of obtaining a divorce and that he related this information to Mr. Williams, an attorney. He testified that shortly thereafter he received two copies of the final decree of divorce from Mr. Williams and that he thereupon called the Morris' who requested that the decree be mailed to them.

The next witness for the defense was the Circuit Judge who had rendered the decree dated February 5, 1970. He testified that Roy Williams, a practicing attorney, had presented the decree to him for signature.

The State then called an officer of the Birmingham Bar Association in rebuttal, who testified regarding a certain statement given to him under oath by Peter Morris. The statement was then introduced into evidence and the State rested its case in rebuttal.

The Petitioner then renewed his motion for a directed verdict as well as his motion to compel the State to make an election, both motions being overruled by the trial court.

After oral argument the Petitioner objected to that portion of the Court's oral charge to the jury as it related to the Court reading the provisions of two Code sections and on the grounds that the oral charge, in its entirety, permitted the jury to convict if it found the Petitioner had violated either of the Code provisions read, without regard to whether such conduct was alleged in the district attorney's complaint.

The jury returned a verdict of guilty and assessed the Petitioner's fine at $400.00.

Shortly thereafter one of the attorneys for Petitioner identified a paper as having been found in the jury room after the jury concluded its deliberations. The paper, indicating an apparent quotient verdict, was introduced into evidence.

The State then called one of the jurors who testified that the writing on the paper was his but that there was no prior agreement to be bound by the quotient obtained. Thereupon Petitioner moved to continue the hearing until such time as would permit his counsel to interview and call as witnesses other jurors who had heard the case. This motion for a continuance, as well as a motion for new trial, were overruled by the Court.

REASONS FOR GRANTING THE WRIT

I.

WAS PETITIONER PRATT DENIED HIS XIV AMENDMENT RIGHTS WHEN THE STATE OF ALABAMA FAILED TO ELECT UNDER WHICH ALABAMA STATUTE IT PROSECUTED HIM?

The district attorney's complaint upon which this prosecution was brought charged that Petitioner unlawfully engaged in the practice of law after having previously surrendered his license in that on a given date he did meet Sherry Morris at a certain place in Jefferson County, Alabama, and did then and there agree to obtain for her and her husband a divorce in consideration of payment to himself of $160.00. The complaint further alleged that shortly after

February 5, 1970, Sherry Morris received a divorce decree, the words of which were set forth in the complaint in its entirety.

Two sections of Title 46 of the *Code of Alabama* are pertinent to the offense charged: Section 31 provides that any person whose license shall have expired either by disbarment or otherwise and who thereafter practices or assumes to act or holds himself out to the public as a person qualified to practice or carry on the calling of a lawyer shall be guilty of a misdemeanor; and Section 42 sets forth in detail certain acts constituting "practicing law" and further provides that any person doing any such act is guilty of a misdemeanor.

Appellant's demurrer at the initial stages of the trial questioned the sufficiency of the complaint to state an offense under either of the aforementioned sections of the *Code of Alabama*. Construing the complaint most strongly against the pleader, as is the Alabama rule, it alleges no more than that the Appellant obtained from Sherry Morris $160.00 as consideration for his agreement to obtain for her and her husband a divorce. There is nothing in this complaint which would constitute an offense under Title 46, Section 31 of the *Code of Alabama*. The allegations of the complaint fail to allege sufficient facts to bring the conduct charged within any of the four subsections of Title 46, Section 42 of the *Code of Alabama*.

This complaint must withstand attack on its particular allegations and not on the general allegation that the accused "did unlawfully engage in the practice of law." Statutes creating crimes are to be strictly construed in favor of the accused and may not be held to extend to cases not covered by the words used. *United States v. Resnick*, 299 U.S. 207, 57 S. Ct. 126, 81 L. Ed. 127 (1936). No accused can be punished for a violation of a criminal statute unless his case is plainly and unmistakably within its terms. *United States v. Lacher*, 134 U.S. 624, 10 S. Ct. 625, 33 L. Ed. 1080 (1899).

The complaint on which this prosecution is based falls somewhere between two sections of the *Code of Ala-*

bama, and not specifically upon either code section. The State of Alabama made no election as to which section it was proceeding under so the complaint violates the constitutional guarantee of due process in failing to apprise the Petitioner of exactly what he must defend against. Criminal or penal statutes must be strictly construed. *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563 (1875); *France v. United States*, 164 U.S. 676, 17 S. Ct. 219, 41 L. Ed. 595 (1896).

When a general term is used in a statute creating or defining an offense and it is followed by terms more specific or precise, an indictment or information using only the general term is insufficient. *Horton v. State*, 53 Ala. 488, (1875); *State v. Plunkett*, 2 Stew. 11 (Ala. 1832). The indictment must stand on the particular conduct alleged as constituting the offense charged and here the district attorney's complaint charges no conduct proscribed by any statute pertinent to this cause. Therefore, the specific allegations contained in the complaint fail to charge an offense. See *Mitchell v. State*, 41 Al. App. 254, 130 So. 2d 198 (1961). In the operation of a penal statute, all reasonable doubt as to the offense charged ought to operate in favor of the defendant. *Ex Parte Webb*, 225 U.S. 663, 32 S. Ct. 769, 56 L. Ed. 1248 (1911).

II

WAS PETITIONER PRATT DENIED EQUAL PROTECTION OF THE LAW UNDER AMENDMENT XIV WHERE THE TRIAL COURT DENIED HIM SUFFICIENT TIME TO REBUT THE TESTIMONY OF A STATE'S WITNESS AFTER A PRESUMPTION OF AN ILLEGAL VERDICT WAS RAISED?

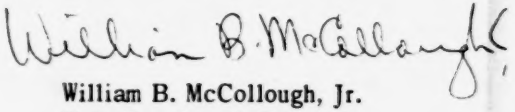
At the conclusion of the trial a piece of paper was retrieved from the jury room which raised the reasonable presumption that the verdict was a gambling or quotient verdict. *International Agri. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549 (1913). It is the law of Alabama that testimony of the jurors is available to rebut or deny the presumption of an illegal verdict. *George's Restaurant v. Dukes*, 216 Ala. 239, 113 So. 53 (1927).

There was no doubt that the presumption of an illegal verdict was raised here, as is noted in the opinion of the Alabama Court of Criminal Appeals. However, only the State was allowed to present evidence and thereby sustain the verdict. Petitioner moved the Court to allow him time to interview various members of the jury in order to sustain the presumption of an illegal verdict. However, the trial court, as well as the Court of Criminal Appeals, summarily dismissed Petitioner's request on the grounds that such a matter was within the "sound discretion" of the trial court. In doing so, the courts have denied Petitioner his constitutional right to equal protection of the law. If the State is allowed to produce testimony to rebut a presumption of the illegality of a verdict, the same right must extend to the defendant or he is denied equality with the State before the bar of justice. Every procedure which fails to maintain an equal balance between the state and the accused denies the latter due process of law. *Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The trial court has surely abused its discretion in failing to allow Petitioner time in which to produce evidence to sustain the presumption of an illegal verdict.

CONCLUSION

To protect the fundamental constitutional rights of the Petitioner, a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,



William B. McCollough, Jr.
McCollough & McCollough
910 Frank Nelson Building
Birmingham, Alabama 35203

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, William B. McCollough, Jr., attorney for Robert N. Pratt, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9 day of August, 1973, I served three copies of the foregoing Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on the State of Alabama as follows:

By mailing in the United States Mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable William J. Baxley, Attorney General of the State of Alabama, Office of the Attorney General, State of Alabama Administrative Building, Montgomery, Alabama 36104.

William B. McCollough, Jr.

William B. McCollough, Jr.
Attorney for Robert N. Pratt
910 Frank Nelson Building
Birmingham, Alabama 35203

MARCH 20, 1973

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1972–73

6 Div. 302

Robert N. Pratt

v.

State

Appeal from Jefferson Circuit Court

PER CURIAM

Appellee filed an information in the Circuit of Jefferson County charging the defendant with unlawfully practicing law after having previously surrendered his license to practice. A jury convicted him of the offense charged in the information and fined him $400.00. The trial judge sentenced him to imprisonment in the county jail for a term of six months. The judge suspended the sentence and put him on probation for eighteen months. Defendant here appeals from the final judgment.

The trial in the Circuit Court followed defendant's appeal from a judgment in the Criminal Court of Jefferson County wherein he was adjudged guilty of the offense charged in the information. The trial in the Circuit Court was de novo.

The information, omitting the caption and copy of the divorce, reads as follows:

> "The State of Alabama, by its District Attorney, complains of Robert N. Pratt, whose name is otherwise unknown, That, within twelve months before the commencement of this prosecution, Robert N. Pratt did, in said county, unlawfully engage in the practice of law, after having previously surrendered his license to practice law, in this, that on to-wit:

September 15, 1969, he did meet with one Sherry Morris at the parking lot of Miller's Discount Store at the Westgate Shopping Center on U. S. Highway 78 West in Jefferson County, Alabama, and did then and there agree to obtain for the Morrises a divorce in consideration of payment to Robert N. Pratt the sum of One Hundred Sixty and no/100 Dollars, which said sum was paid and receipt given to Sherry Morris for said amount, signed by R. N. Pratt.

"The State of Alabama, by its District Attorney, further complains that sometime shortly after February 5, 1970, Sherry Morris received in the mail, a divorce decree in words and figures as follows:"

We think the demurrer to the information, with its several grounds, is without merit. The information charges the offense with such a degree of certainty and clarity as to put the defendant on notice of the nature and cause of the accusation against him. We do not think he could have had a reasonable doubt as to what he was called upon to defend. *Rogers v. State*, 12 Ala. App. 196, 199, 67 So. 781. It meets the requirements of Tit. 15, § 363, Recompiled Code of Alabama, 1958.

Two grounds of the demurrer are as follows:

"For that said complaint does not sufficiently charge the defendant with conduct proscribed by Title 46, Section 42, of the Code."

"For that it does not appear from the face of the complaint whether the defendant is being prosecuted for a violation of Section 31, or Section 42, of Title 46 of the Code of Alabama."

Tit. 46, § 31, Recompiled Code of Alabama, 1958, to which the demurrer refers, reads as follows:

"If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within thirty days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed five hundred dollars, or be

imprisoned for a period not to exceed six months, or both."

Tit. 46, § 42, Code, supra, defines in sub-paragraphs (a), (b) and (c) certain acts that constitute the practice of law. It also provides that "... Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this *article* to be an act of practicing law, is guilty of a misdemeanor, and on conviction must be punished as provided by law...." (Emphasis supplied.) The punishment provided by law is found in Tit. 15, § 327, Code, supra.

It is to be noted that Tit. 46, § 42, Code, supra, is copied from General Acts, 1949, p. 194, approved January 20, 1949, which amended Tit. 46, § 42, Code of Alabama, 1940. The amendment is the last legislative expression fixing punishment for the misdemeanor mentioned in 31, supra, which is included in Article, Chapter 3, along with § 42, supra. In other words, the amendatory Act of 1949, uses the word "article" which includes § 31, supra. The punishment provided in said § 31 is superseded by the punishment provided in the amendatory Act of 1949, which appears in Tit. 46, § 42, Recompiled Code of 1958, and in General Acts, supra.

There is no conflict between §§ 31 and 42, supra, in their application to the transaction set forth in the information. Only one transaction of illegal practice is charged in the information. This transaction is prohibited by both §§ 31, and 42, supra, with punishment therefor fixed by the amendatory Act of 1949, supra. We fail to see that the defendant was not fully informed of the transaction for which he was being prosecuted. There was no occasion for an election on the part of the State between the two prohibitory laws. The only difference is that § 42 is more definitive than § 31. The information is sufficiently definitive of the involved transaction to meet the requirements of the law. In *Brooms v. State*, 197 Ala. 419, 73 So. 35 (10), the Supreme Court of Alabama observed as follows:

> "'... The court will not exercise the power to compel an election unless it appears either from the indictment or the evidence that an attempt is made to convict the accused of two or more offenses

growing out of separate and distinct transactions. *Mayo v. State*, 30 Ala. 32; *Wooster v. State*, 55 Ala. 217.' . . ."

Both the demurrer and the motion to require the State to elect were properly overruled.

We now reach the merits of the case. It is stipulated and agreed between the counsel for the State and the attorneys representing the defendant that the latter did voluntarily surrender his license to practice law. The surrender was in 1964. It was also agreed that the license to practice law "is today the same as it was in 1964 based upon the voluntary surrender."

The transaction here charged in the information took place in September, 1969. One Sherry Parker, now Mrs. Sherry Morris, and her husband, Peter Morris, contacted defendant early in September, 1969, in his home, whereat the question of a divorce between Mr. and Mrs. Morris was discussed. Defendant advised and counseled them to wait awhile and see if they could not reconcile their differences and preserve their marriage. This they agreed to do.

The attempted reconciliation failed. A divorce followed. We here state Mrs. Morris married a Mr. Parker, while Mr. Morris married a niece of defendant. To avoid confusion, we will hereafter refer to Mrs. Parker as Mrs. Morris.

Mrs. Morris by appointment met the defendant at Westgate Shopping Center, on Highway 78, in Jefferson County, on September 15, 1969, at which time she paid the defendant the sum of $160.00 in cash, for which she obtained defendant's receipt which defendant admits. The receipt is in evidence. The money was paid to cover the fee and expenses of obtaining a divorce. The husband, Peter Morris, did not make any contribution to the payment. A divorce decree, dated February 5, 1970, reached Mrs. Morris by mail. Mrs. Morris also testified that at the time she paid the $160.00 she signed some divorce papers that Mr. Pratt handed to her. The State thereupon re-offered in evidence Exhibit No. 3, which is the divorce paper Mrs. Morris testified she signed at the time she paid the $160.00. This exhibit does not appear in the record. The court reporter certified that the

exhibit was not located within the possession of the court; that counsel for the parties stipulated and agreed that they would forward the exhibit. The exhibit has not reached this court.

Mrs. Morris testified about meeting the defendant at his home at another time prior to the divorce at which time she and her husband, who was present, informed the defendant about an agreement she and her husband had reached about dividing their personal property. Defendant made notes about the division. Mrs. Morris denied that she knew an attorney by the name of Williams and said that she never heard his name mentioned in her contacts with defendant with respect to the divorce.

The defendant admitted that Mr. and Mrs. Morris came to see him about a divorce; that he received the $160.00 which Mrs. Morris testified she paid him. He contended in his evidence that it was understood and agreed that Mr. Williams, an attorney, was to handle the proceedings to get the divorce; that he informed Mr and Mrs. Morris that he could not practice law; hence, he would turn over the data and money to Mr. Williams and that Mr. Williams was to process the divorce proceedings to a conclusion.

Mr. Morris testified as a witness for defendant. The witness stated that it was understood between Mrs. Morris and himself that Mr. Williams was to perform the legal services necessary to get the divorce and that the defendant could not serve as an attorney in the proceedings.

The Chancellor, Judge Barber, who granted the divorce admitted that he was hazy as to what attorney represented the complainant, Mrs. Morris, in the divorce proceedings, but he was sure Mr. Williams presented the divorce proceedings to him for judicial action.

The Chancellor, over the objection of defendant and an adverse ruling of the trial court, testified that the court file relating to the divorce was resubmitted to him on July 13, 1970; that he affirmed the original decree of divorce. It appears that the witnesses in the case did not appear before a commissioner who had certified the evidence. The Chancellor did not remember the attorneys who appeared in the

supplemental proceedings to affirm the original decree.

The original decree of divorce was defective for that the witnesses did not appear before the Commissioner. The supplemental proceedings were filed to perfect the original decree. The information alleges that defendant agreed to obtain a divorce for the Morrises for a stated consideration. The supplemental proceedings were admissible to show performance of the alleged agreement with defendant to obtain the divorce – one that was valid.

Exhibit No. 5, offered by the State and admitted in evidence over the objection of the defendant, is not in the record or before this Court. The exhibit was offered in connection with the testimony of Mr. Frank Bainbridge, Chairman of the Birmingham Bar Association in 1970. The court reporter certified that the exhibit was not located in possession of the court and that counsel agreed and stipulated that the exhibit would be forwarded under separate cover. The exhibit has not reached this Court. We cannot consider the relevancy of the exhibit.

Defendant filed and presented to the nisi prius court his motion for a new trial. The motion, containing thirty-nine grounds, was regularly continued and heard by the court. Oral evidence was taken with respect to grounds 24 and 27, inclusive, which in effect assert that the jury returned a quotient to which they bound themselves by agreement.

The evidence of the jury foreman shows that the jury members were in disagreement as to the amount of the fine, although in agreement as to the guilt of the defendant. Suggestion was made and followed that the amount of the fine determined by each juror be listed and the total divided by twelve. The foreman did the listing on a piece of paper which was found in the jury room after the verdict. The total was divided by twelve.

The foreman testified that at no time prior to the listing and the division did the jury "agree prior to settling on any result, including taking the average. The only reason we made the average, somebody said, 'what is the average?' and it was discussed. At no time did we agree to ab de (sic) by the average of any other man's."

The piece of paper picked up in the jury room right after the verdict was rendered to which we have made reference, supra, marked Exhibit A, raises a reasonable presumption that the verdict was a gambling or quotient verdict. *International Agri. Cor. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L.R.A. (N.S.) 415; *George's Restaurant v. Dukes*, 216 Ala. 239, 112 So. 53.

Evidence of the jurors on a motion for a new trial is admissible to sustain the verdict. *George's Restaurant v. Dukes*, supra. The evidence of the foreman tended to sustain the verdict and overcome the presumption of a quotient verdict. We will not charge the trial judge who heard the motion with error in overruling the motion.

At the conclusion of the evidence on the motion, the defendant moved the court to continue the hearing to the end that the defendant be given an opportunity to interview "various jurors" that counsel had not had the opportunity to do. The court denied the continuance. There was no error in such denial. Granting or refusing the continuance was within the sound discretion of the court. *Steele v. Gill*, 283 Ala. 364, 217 So. 2d 75.

There was sufficient evidence adduced from which the jury could conclude beyond a reasonable doubt, as they did, that the defendant was guilty as charged in the information. A lengthy delineation of the evidence would serve no useful purpose. Suffice it to say that the State's evidence tended to show that the defendant accepted Mrs. Morris's employment to get her divorce from her husband, accepted $160.00 for such services, and proceeded with the case to a conclusion of divorcement.

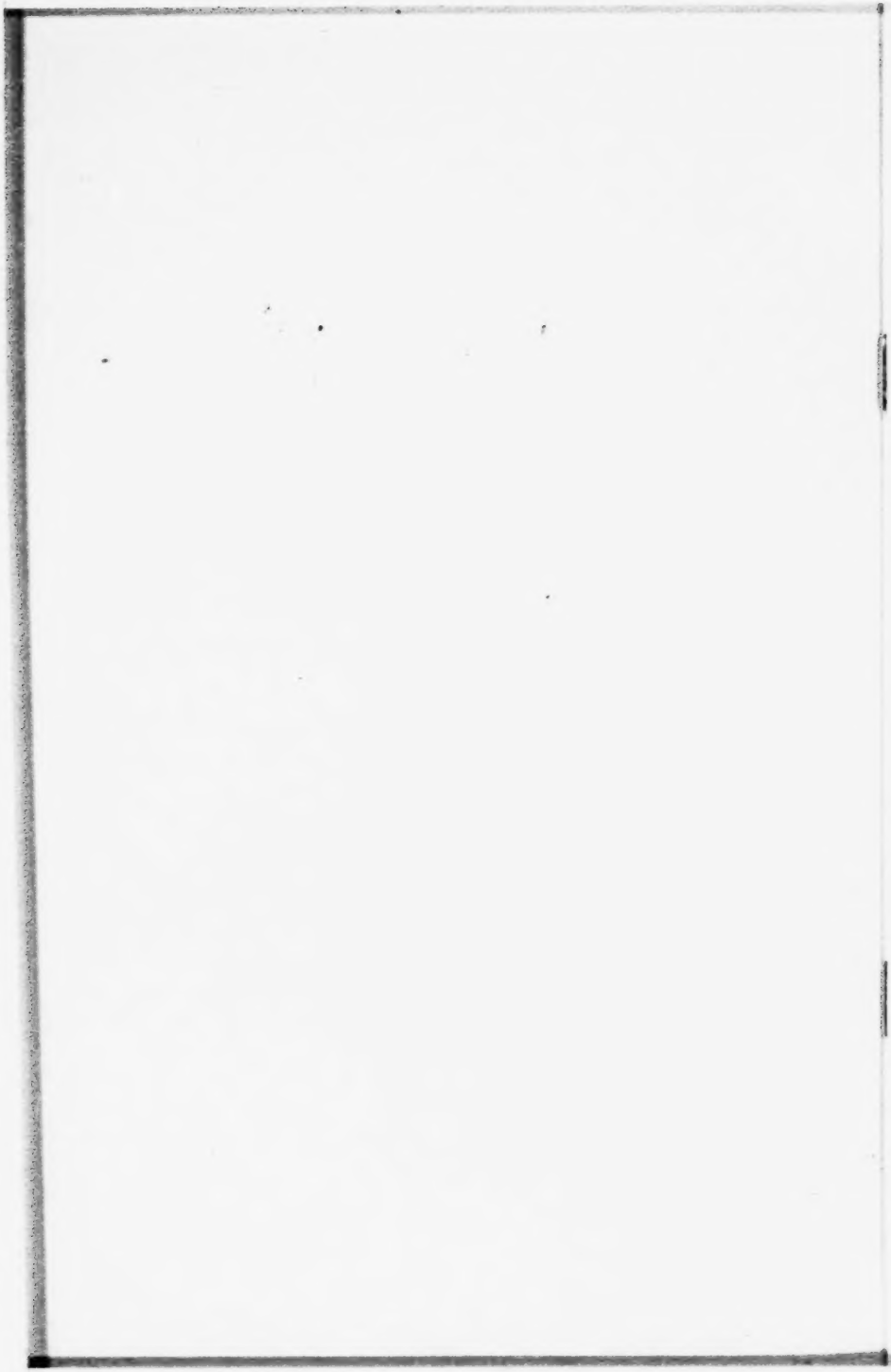
The defendant's evidence contradicted such employment and tended to show that he was merely accommodating Mrs. Morris, that he informed her he could not practice law, and that he turned the case over to another lawyer, Mr. Williams, who handled the transaction to a conclusion.

The jury heard all the evidence and resolved the conflicts against defendant. We will not disturb the verdict.

We think the judgment of guilty and the fixing of the punishment should be and it is

AFFIRMED.

All the judges concur.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-288

ROBERT N. PRATT,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General
State of Alabama

DAVID W. CLARK
Assistant Attorney General
State of Alabama
Montgomery, Alabama 36104
Counsel for Respondent

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Robert N. Pratt v. State of Alabama, 6th Division 302, 278 So. 2d 724. Certiorari was denied, 278 So. 2d 729.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered March 20, 1973. Application for rehearing the Court of Criminal Appeals of Alabama was denied on April 17, 1973. A petition to the Supreme Court of Alabama for writ of certiorari was denied on May 24, 1973. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Was petitioner denied his Fourteenth Amendment rights when the Court failed to exercise the power to compel an election where only one offense was charged?

2. Was overruling motion for continuance violative of constitutional rights of accused on his motion for new trial even though there was a period of one hundred and six days from the time of filing motion to hearing in which to interview witnesses?

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The District Attorney filed an information in the Circuit Court of Jefferson County charging petitioner with unlawfully practicing law after having previously surrendered his license. The information is set out on A-1 and A-2 of Appendix to petitioner's brief. Demurrer was filed and overruled. At the beginning of the trial petitioner orally moved to require the State to make an election under which Section of Title 46 of the Code (31 or 42) and advise petitioner. Motion was overruled (R. p. 18). After jury trial, verdict and sentence, petitioner filed motion for new trial on July 6, 1971, heard and overruled on October 20, 1971. At the hearing on October 20, 1971, petitioner moved for a continuance in order to interview various jurors concerning an alleged quotient verdict. Motion was overruled (R. p. 181).

VI

SUMMARY OF ARGUMENT

Overruling of motion to require the State to make an election was not error and did not violate constitutional rights of petitioner where only one offense was charged and where ruling was pursuant to the State law and procedure.

The overruling motion for a continuance during hearing on motion for new trial, using State law and procedure, was a discretionary ruling by the trial judge and did not raise a federal or constitutional question to support the jurisdiction of this Honorable Court.

VII

ARGUMENT

Petitioner, a white disbarred attorney, argues in his brief that his constitutional rights were violated when the State of Alabama failed to elect under which Alabama statute it prosecuted him.

Under Article 1 of Chapter 3 of Title 46, Recompiled Code of Alabama 1958 are found Sections 21 through 61 dealing with "Organization, etc. of State Bar; License and Practice".

Section 31 of Title 46 is set out on page A-2 of petition and is adopted herein by reference.

Section 42 of Title 46, Recompiled Code of Alabama 1958 provides in part as follows:

> "Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: . . . . ."

In the opinion of the Court of Criminal Appeals of Alabama in *Robert N. Pratt v. State*, 278 So. 2d 724, the Court held:

> "There is no conflict between §§ 31 and 42, supra, in their application to the transaction set forth in the information. Only one transaction of illegal practice is charged in the information. This transaction is prohibited by both §§ 31, and 42, supra, with punishment therefor fixed by the amendatory Act of 1949, supra. We fail to see that the defendant was not fully informed of

the transaction for which he was being prosecuted. There was no occasion for an election on the part of the State between the two prohibitory laws. The only difference is that § 42 is more definitive than § 31. The information is sufficiently definitive of the involved transaction to meet the requirements of the law. In *Broom v. State*, 197 Ala. 419, 73 So. 35 (10), the Supreme Court of Alabama observed as follows:

> "'. . . The court will not exercise the power to compel an election unless it appears either from the indictment or the evidence that an attempt is made to convict the accused of two or more offenses growing out of separate and distinct transactions. *Mayo v. State*, 30 Ala. 32; *Wooster v. State*, 55 Ala. 217.' . . ."

Both the demurrer and the motion to require the State to elect were properly overruled."

In the case at hand there was no error in overruling petitioner's motion for an election and no denial of a constitutional right because the petitioner was being tried for only one offense growing out of one distinct act, namely, that he unlawfully practiced law after surrendering his license in the obtaining of a divorce for Sherry Morris.

The matter of the correct section of the Code setting out the offense was argued in the case of *John Ike Griffith v. State*, 255 So. 2d 48, cert. denied 405 U.S. 1042, 31 L. Ed. 2d 583, 92 S. Ct. 1317 and ruled adversely to petitioner.

The question of legislative intent as expressed in the enactment of these Code sections is to be considered.

United States v. Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. Ed. 1080 held:

> "The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or rather, if it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

The question of the Court's failure to exercise the power to compel an election is based upon state procedure, involves no federal question and does not support this Honorable Court's jurisdiction.

This Honorable Court has held that where a decision is based upon a matter of practice, by a State court under State procedure, it does not draw in question any right the complainant has under the Constitution or laws of the United States. *Thorington v. City Council of Montgomery*, 147 U. S. 490, 13 S. Ct. 394.

Petitioner contends that he was denied his constitutional rights to equal protection of the law under the Fourteenth Amendment when the trial Court denied his motion for a continuance to interview various jurors. This contention is without merit. Both State and Federal Courts have consistently held that the granting or refusal of a continuance is discretionary subject to reversal only upon a showing of gross abuse of such discretion.

Granting or refusing the continuance was within the discretion of the trial Court. *Butler v. State*, 285 Ala. 387, 232 So. 2d 631.

In the case now before this Honorable Court the basis of the motion for a continuance was that he needed time to interview certain jurors. Respondent calls the Court's attention to the fact that the motion for new trial was filed on July 6, 1971 and was not heard until October 20, 1971, some 106 days later.

In *Burton v. State*, 187 So. 2d 808 the Court held:

> "Whether time allowed counsel for a defendant for preparation for trial is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses. *Ray v. United States*, 197 F. 2d 268 . . . "

Here petitioner had filed the motion raising certain grounds. He knew the names and whereabouts of witnesses, etc. 106 days was certainly adequate time for preparation for a hearing on motion for new trial.

Respondent submits further that the above contention does not raise a Federal question. It involves State procedure and does not draw in question any right under the Constitution and laws of the United States and certainly no denial of due process resulted from the overruling of the motion for continuance.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the petitioner was indicted, tried, convicted and sentenced prop-

erly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General
State of Alabama

David W. Clark

DAVID W. CLARK
Assistant Attorney General
State of Alabama

State Administrative Building
Montgomery, Alabama

Counsel for Respondent

IX

CERTIFICATE

I, David W. Clark, one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6 day of September, 1973, I served three copies of the foregoing brief and argu-

ment on one of the attorneys for Petitioner, by mailing said copies in a duly addressed envelope to said attorney of record, as follows:

TO: Honorable William B. McCullough, Jr.
910 Frank Nelson Building
Birmingham, Alabama 35203

David W. Clark

DAVID W. CLARK
Assistant Attorney General
State of Alabama

State Administrative Building
Montgomery, Alabama 36104